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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 681

JAMES A. ROBINSON, DECEASED, BY BESSIE L. TALLAFERRO ROBINSON, MYRRH E. MARTIN SNELL, THELMA M. ROBINSON VANCE, RAY M. ROBINSON, JOHN S. ROBINSON, CLARA L. MILLER ROBINSON, GRACE BROWN, MACK R. BROWN, EDWARD R. TALLAFERRO, LUCIAN R. TALLAFERRO, CLAUDE N. BROWN, NANCY R. BROWN, ROBERT BROWN, ORVILLE L. ROGERS, BESSIE BIZER AND ARCHIE V. ANDERSON, FOR THEMSELVES AND THEIR HEIRS,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The above named Petitioners, by their counsel of record, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Claims entered in the above entitled cause on the 5th day of April, 1965.

Aside and apart from the said judgment of the court entered on April 5, 1965, there was no opinion of the Court of Claims. The court's order or judgment entered April 5, 1965, is set forth in the appendix, infra, pp. 31-32.

JURISDICTION

The judgment of the Court of Claims, as aforesaid, was entered April 5, 1965 (Appendix, infra, pp. 31-32). The petitioners' motion for a rehearing was denied by order of the United States Court of Claims, entered on June 11, 1965 (Appendix, infra, p. 32). The time for filing petition for a writ of certiorari herein was extended to and including the 11th day of October, 1965, by an order of this Court entered on September 8, 1965. The time for filing petition for a writ of certiorari was again extended to and including the 20th day of October, 1965, by orders of this Court entered September 8, and October , 1965. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255(1).

QUESTIONS PRESENTED

1. Whether the petitioners, in their complaint, allege claims arising from the taking by the United States within the meaning of the Act of August 13, 1946, 25 U.S.C., Section 70(b), 60 Stat. 1050.

2. Whether the rights and benefits accruing to petitioners, pursuant to the foregoing statute, are enforceable in the United States Court of Claims.

3. Whether the provisions of 60 Stat. 1049, et seq. constitute a legislative repeal of "res judicata" issues in respect to petitioners.

4. Whether the defense of statute of limitation may be invoked to bar "claims based upon fair and honorable dealings that are recognized by any existing rule of law or equity," as provided under the said Act of August 13, 1946.

5. Whether the United States Court of Claims has jurisdiction to determine the rights of petitioners to participate in the $14,789,476.16 awarded the Chero-

kee Indian Nation against the United States Treasury Department on September 14, 1961.

6. Whether the contract of employment of attorneys is in substantial compliance of law.

7. Whether the defendant computed the time correctly when alleging that the statute of limitations had run.

STATUTES AND TREATIES INVOLVED

Relevant provisions of applicable statutes and treaties are set out in the Appendix at pp. 33-34.

STATEMENT

The petitioners, a group of identifiable Cherokee Indians, brought an action in the United States Court of Claims to recover (1) for an accounting "for all moneys appropriated by Congress in which the petitioners were entitled," (2) for the restoration to the petitioners, "all the lands, including agricultural, oil and all other mineral rights," (3) that the respondent pay to the petitioners, "damages that have been incurred for the time that the petitioners have been deprived of their lands and the production of said lands," (4) that petitioners "be paid 4% interest as reasonable compensation for being deprived of the use of said properties and monies, as aforesaid," (5) "that allowance be made to petitioners' attorneys for reasonable expenses incurred herein, with attorney fees of ten per cent of the amount recovered," and (6) "for such other and further relief as in the premises they may be entitled."

The allegations of the petition, filed in the Court of Claims, and which gave rise to the foregoing relief sought, are substantially as follows: that the petitioners are an identifiable group of the Cherokee Freedmen established by the treaty of July 19, 1866 (14 Stat. 799, 11 Kap. 942), under which they were given all the

rights of Native Cherokee Indians, and that they are now an identifiable group of individuals within the meaning of the 9th Article of said treaty.

That thereafter the Cherokee Freedmen have continuously been recognized by the respondent and by statute as an identifiable group and dealt with respecting property rights and obligations owed them as members and part of the Cherokee Nation of Indians (30 Ct. Clms. 138; Ct. Clms. 180; 44 Clms. 453).

That petitioners herein are descendants, heirs and successors in interest of the Cherokee Freedmen, who were by the said treaty of July 19, 1866, liberated pursuant to the voluntary act of their former owners, and by law are the descendants and heirs of the free colored persons who were occupying and living in the Cherokee Nation in Indian territory, now the state of Oklahoma, and owned and occupied by the Cherokee Indians at the commencement of the rebellion.

That the petitioners, as such members and citizens of the Cherokee Indian Nation and Tribe, therefore bring this suit under Section 10 of the Act of August 13, 1946:

> "That the individual petitioners, above-named appear and make their claims as individuals and as far as permitted by law, their heirs and successors in interest, who may be found to be entitled to participate in any judgment which may be recovered by the Cherokee Indian Tribes, or Cherokee Freedmen, and in any property or money to which they are entitled."

That petitioners:

> "Use as successors in interest of the Cherokee Freedmen and as Rejected Cherokee Freedmen similarly situated who are or/and as representatives of all Cherokee Freedmen of the same class."

Petitioners further alleged in their petition that the proceeding is brought pursuant to the Act of Congress passed October 1, 1890 (26 Stat. 636, 1 Kp. 372, ap-

proved by the Act of August 13, 1946 (60 Stat. 1050). "An Act to create an Indian Claims Commission, to provide the powers, duties and functions thereof, and for other purposes." That petitioners' claims accrued prior to said Act and have not been adjudicated.

It is further alleged in the petition that the respondent by treaties, Acts of Congress and decisions of court, has recognized the interest and title of the Cherokee Freedmen inclusive with the Cherokee Nation and ratified and confirmed their claims to the lands occupied and possessed by them, providing that any sale, if made, must be to the United States (14 Stat. 799).

That within the time prescribed by law, pursuant to the said treaty of 1866, the Cherokee Freedmen remained and established themselves in the Indian Nation as adopted members of the Cherokee Tribe. That they in every way became an integral part of the Cherokee Indian Nation.

That Congress in 1888 and 1889 authorized a roll to be made of Cherokee Freedmen within the meaning of Section IX of the treaty of 1866. And that pursuant to said statutes (25 Stat. 608, 994) the "Wallace Roll" was prepared. That thereafter, on October 1, 1890, Congress conferred jurisdiction on the Court of Claim to hear and determine "the just rights in law and equity — of the Cherokee Nation under the provisions and stipulation of Article Nine of the aforesaid treaty." (26 Stat. 636.) Recognition was thereby given to the Cherokee Freedmen as a class with the right of filing a claim through the Court of Claims against the Cherokee Nation and the United States to recover all monies, lands and rights due them under the said treaty.

That in pursuance thereof the Court of Claims took jurisdiction of the claims of said Freedmen and decided (30 Ct. Clms. 138, 180, Feb. 3, 1896) that the

Freedmen to whom the Freedmen referred were those who were living in, or who had returned to the Nation within six months after the promulgation of said treaty, and their descendants and and that all others were excluded from the benefits of said treaty.

That thereupon the Secretary of the Interior was ordered to appoint a Commission to make a roll of those persons so entitled. That the court further decreed (and it was so directed by Congress, October 1, 1890, 26 Stat. 631) that those Freedmen became citizens of the Nation equally with the Cherokees, equally interested and lawfully entitled to equally participate in the common property of the Cherokee Nation, and to share equally in the distribution of $8,500,000.00. That by direction of Congress, this sum was distributed equally to the legal residents of the Cherokee Nation, which included the Cherokee Freedmen so enrolled. That thereby and at all times thereafter the Cherokee Freedmen were recognized and treated by the United States as legally adopted members of the Cherokee Indian Nation.

That the award rendered by the Indian Claims Commission against the United States Treasury Department, Fiscal Service, Bureau of Account, Budget and Administrative Accounts, Branch on the 14th day of September, 1961, in the amount of $14,789,476.16, was authorized to be paid by the Indian Claims Commission to citizens of the Cherokee Nation, whose names appeared on the 1897 Tribal Roll, are the persons to share in this fund, including their descendants; and that all of the petitioners herein were members of the 1897 roll, but are not to share in said funds. That respondent is now estopped from denying that the said Freedmen were members and citizens of said Tribe.

The petitioners further alleged that the respondent, during all of the times described above maintained a fiduciary relationship and guardianship over the said

Freedmen and their rights, the same as was exercised by it over the Cherokee Indian Nation. That all of said rights were under the supervision of the Secretary of the Interior.

The petition further averred that by the Act of March 3, 1893 (27 Stat. L. 612, 645, ch. 209) the Commission to the five civilized tribes was created, and on June 10, 1896 (29 Stat. 321) that Commission known as the Dawes Commission, was directed to enroll the citizens of the respective tribes. That the Dawes Commission provided: "that the rolls of citizenship of the several tribes as now existing are hereby confirmed," and the Commission should "add thereto the names of citizens whose right may be conferred under the act." That accordingly the said rolls were submitted to the Secretary of the Interior for approval. That by the Act of June 28, 1898 (30 Stat. 495) known as the Curtis Act, Congress gave the further following instructions to the Commission:

> "Sec. 21, That in making rolls of citizenship of the several tribes, as required by law, the Commission to the five tribes * * * shall make a roll of Cherokee Freedmen in strict compliance with the decree of the Court of Claims rendered the 3rd day of February, 1896 (30 Ct. Clms. 138 180).

It is next alleged in the petition that on April 9, 1901, the respondent entered into an agreement with the Cherokee Nation of Indians for the allotment of their lands, the manner of enrollment of the citizens of the said Cherokee Nation, by which it was specifically agreed that "such rolls shall be made in strict compliance with the provisions of Section 21 of the Act of Congress of June 28, 1898." That the foregoing agreement was approved by Congress on March 1, 1901, 21 Stat. 848, 1 Kap. 715, 724. That likewise "the strict compliance provision" was embodied in the Act of July 1, 1902 (32 Stat. 716, 1 Kap. 787).

That by the Act of April 26, 1906 (34 Stat. 137, 3 Kap. 196) Congress provided for the final disposition of the affairs of the Five Civilized Tribes, in directing that the Commission be terminated, and that all books, records and files be turned over to the Secretary of the Interior with authorization to complete the rolls and to include only those persons whose names appeared upon any of the tribal rolls, whose applications were made prior to December 5, 1905, and gave the said Secretary until March 4, 1907, within which to carry out those directives, at which time his jurisdiction in that respect ended.

It is next averred that the said Commission and the Secretary of the Interior, as agents and representatives of the respondent, entered upon their duties prescribed by Congress, but in violation of the trust reposed in them, by administering said trust in a discriminatory and fraudulent manner against the petitioners and their ancestors, in refusing to accept and consider the membership rolls of the said Freedmen authorized by Congress and the Court of Claims. That without notice or warning, they illegally and without authority entirely eliminated these petitioner from the tribal rolls, and/or refused to accept their applications for allotments of lands and payments of money to which petitioners were lawfully entitled. That as a result of which the petitioners were deprived of their property and lawful right to participate in the property of the Cherokee Tribe, for which respondent should account to petitioners.

That lastly, the petitioners alleged that in furtherance of the said unlawful and fraudulent acts of respondent's agents, the petitioners became confused and bewildered, and suffered loss and were deprived of their properties and monies which Congress and the court intended for them.

That the petition then details the description of the lands of which they have been deprived. Said descriptions appear on pp. 28-29 of the Appendix.

The Petition is set out in the Appendix from page 19 to page 31.

That thereafter, and on March 4, 1964, the respondent filed its Motion for Summary Judgment in the United States Court of Claims.

That thereafter, and on March 4, 1964, the respondent filed its Motion for Summary Judgment in the United States Court of Claims.

That the petitioners filed their answer to the said Motion for Summary Judgment on December 8, 1964.

The respondent filed its reply to petitioners' answer on January 15, 1965.

The petitioners filed their memorandum in reply to respondent's reply on March 15, 1965. That thereafter on the 5th day of April, 1965, the United States Court of Claims entered its order granting the respondent's motion for summary judgment and thereby dismissed the petition of the petitioners. That thereafter the petitioners filed in said Court of Claims their request to review the findings of that court on April 26, 1965.

That thereafter, and on June 11, 1965, the United States Court of Claims entered its order denying petitioners' request for the court to review the findings of the court.

That by virtue of the errors committed by the United States Court of Claims in dismissing the petition of the petitioners, the petition for certiorari herein is prosecuted.

REASONS RELIED UPON FOR GRANTING THE WRIT

The outstanding reason why this petition should be granted is the seriousness of the lack of liberal construction accorded pertinent statutes dealing with In-

dian affairs, by the Indian Claims Commission and the United States Court of Claims, especially in respect to the present claims of the petitioners. This, coupled with the crying need for a final decision fully explicating this Court's views on the construction of the provisions of the Act of Congress passed August 13, 1946, 60 Stat. 1049, et seq. Here the Indian Claims Commission has ignored these claims of the petitioners and the United States Court of Claims has held that it is without jurisdiction to consider such claims.

The question, therefore, is:

1. Whether the petition filed in the Court of Claims alleged valid claims within the jurisdiction of said court.

The most recent legislative expression of the Congress is contained in its said Act of August 13, 1946, 60 Stat. 1049, et seq. Among other things, section 2 of said Act (25 U.S.C.A., sec. 70(a)) provides: that the Commission shall hear and determine the following claims against the United States:

> "(1) claims in law or equity arising under the constitution, laws, treaties of the United States and executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States, was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or of fact, or any other ground, cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as a result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant, and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or

> equity. No claim accruing after August 13, 1946, shall be considered by the Commission.
>
> "All claims under this chapter may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States."

While the Court of Claims recognized the liberal impact of said section 2 of the said Indian Claims Commission Act, it failed to apply such liberal construction in the case at bar. Thus in the case of *Otoe and Missouri Tribe of Indians v. United States*, 131 F. Supp. 265 (Ct. Clms.), the Court of Claims conceded, and stated that:

> "We think it quite clear from the face of the Indian Claims Commission Act that in its passage Congress was, to a certain extent, exercising its political function of creating certain new causes of action and recognizing liability in the United States, if the facts warranted, in connection with such causes. In fact the Act clearly creates causes of action and permits suits thereon which would not have been possible, and are not possible, as far as we know, between private individuals."

In spite of the liberal language used by the Court of Claims in its foregoing opinion, the said court failed to apply such liberality in the consideration of the petition of the petitioners.

It is to be noted on pages 12 and 13 of the petitioners' Petition (Appendix, pp. 19-31), that they set out 22 parcels of land taken from them by the United States. They, thereafter, allege in this respect as follows:

> "And other lands, unknown to the heirs of said lands herein, which are in the possession of said records, of the defendant, and by the unlawful taking of said lands from the plaintiffs herein, thus leaving them without any place of habitation or funds with which to sustain themselves, and they and their families were impoverished, all of which was contrary to their just, equita-

> ble, constitutional, and lawful rights, contrary to the promises made to them by treaty of July 19, 1866, and the directive of Congress, and contrary to fair and honorable dealings required of the defendant."

This Court, by its decisions throughout the years, has held the United States liable for the unlawful taking of private property for public use. In *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 809, this Court in affirming a judgment of the Court of Claims for the unlawful taking of real property by the United States, said:

> "The next question is whether or not the Government's destruction of the argicultural value of the respondent's land in this case amounted to a taking of private property for public use within the meaning of the Fifth Amendment. This case comes within the principle that the destruction of privately owned land by flooding is 'a taking' to the extent of the destruction caused. The decisions in Pumpelly v. Green Bay Co., 13 Wall. 166, United States v. Lynch, supra, United States v. Williams, 188 U.S. 445, and same case, 104 F. 50, 53; United States v. Welch, 217 U.S. 333; and United States v. Cress, supra, illustrate the development of that principle."

Again in safeguarding the rights of individual Indians to their land, this Court said in the case of *United States v. Shoshone Tribe*, 304 U.S. 111, 118:

> "Provisions in aid of teaching children and of adult education in farming, and to secure for the tribe medical and mechanical service, to safeguard tribal and individual titles, when taken with other parts of the treaty, plainly evidence purpose on the part of the United States to help to create an independent permanent farming community upon the reservation. Ownership of the land would further that purpose. In the absence of definite expression of intention so to do, the United States will not be held to have kept it from them. The authority of the United States to prescribe title by which individual Indians may hold tracts selected by them within

> the reservation, to pass laws regulating alienation and descent and for the Government of the tribe and its people upon the reservation detracts nothing from the tribe's ownership, but was reserved for the more convenient discharge of the duties of the United States as guardian and sovereign."

This Court also held in *United States v. Klamath*, 304 U.S. 119, 123, that:

> "It is appropriate first to observe that while the United States has power to control and manage the affairs of its Indian wards in good faith for their welfare, that power is subject to constitutional limitations, and does not enable the United States, without paying just compensation therefor, to appropriate land of an Indian tribe to its own use or to hand them over to others."

In the case of *Crow Tribe of Indians v. United States*, 284 F.2d 361 (1960), the Court of Claims approved a judgment in favor of the Crow Tribe Indians in the sum of $10,242,984.70. That in reaching said judgment the Court of Claims further ruled that the issue presented to the court in the prior *Crow* case (81 Ct. Clms. 273-274), were not "res judicata" of the issues presented in the second Crow case.

It appears, therefore, from a fair appraisal of the pertinent statutes and the decisions of this Court, that petitioners' Petition stated a cause of action cognizable in the United States Court of Claims.

2. The defense of statute of limitations is barred under the provisions of 60 Stat. 1050.

It may be noted that the judgment of the Court of Claims, entered on April 5, 1965 (Appendix, pp. 31-32), provides in part that:

> "(1) to the extent that plaintiffs' claim is based on the Indian Claims Commission Act, the claim accrued long prior to August 13, 1946, and this

court has no jurisdiction of the claim under that Act; (2) to the extent that plaintiffs' petition asserts a claim under the Act of October 1, 1890 (26 Stat. 636), the claim is barred by the statute of limitations; (3) to the extent that the petition asserts claims based upon plaintiffs' alleged rights to share in the judgment rendered by the Indian Claims Commission in Cherokee Nation v. United States, Docket No. 173, 9 Ind. Cl. Comm. 435 (1961), the court lacks original jurisdiction to hear and to determine such claims, and (4) to the extent that the petition asserts a claim by individuals that might be cognizable under 28 U.S.C. 1491, the claim is barred by the 6-year statute of limitations,. . .."

It is here contended by the petitioners that statutes of limitations relative to Indian claims are dispensed with under the following language of the Indian Claims Commission Act: "All claims under this chapter may be heard and determined by the commission notwithstanding any statute of limitation or laches, but all other defenses shall be available to the United States."

It is crystal clear from the above language of the Indian Claims Commission Act that Congress has tolled all statute of limitations involving Indian claims and the judgment below is in error insofar as it recites that the claims of the petitioners are barred by the statute of limitations.

Consistent with the raising of the statutory veil, as aforesaid, the claims of the petitioners, as individuals, are immune from the jurisdictional forum of the Indian Claims Commission. This Court has recognized and approved the rights of individual Indian claimants to proceed in the United States Court of Claims in the case of *Cherokee Nation and United States v. Whitmire*, 223 U.S. 108 (1912).

Moreover, in Docket No. 125 of the Indian Claims Commission, in the case of *Cherokee Freedmen and Cherokee Freedmen Association ex rel. Edward*

Curls, et al. v. United States of America, decided on December 28, 1961, the Indian Claims Commission held that the claims "were individual in nature, each depending upon individual facts, that is, did the individual claimant qualify under Article IX of the 1866 treaty?"

The said Commission held that the petitioners herein are individuals in nature and that the Indian Claims Commission was without jurisdiction. Thus, the Commission indicated that such jurisdiction was in the United States Court of Claims, where action should have been brought.

Under the Act of Congress passed October 1, 1890 (26 Stat. 636), Congress conferred jurisdiction on the Court of Claims to hear and determine "the just right in law and equity of the Cherokee Freedmen, who are settled and located in the Cherokee Nation under the provisions and stipulations of Article Nine of the aforesaid treaty."

The Congress has vested these rights in the petitioners and has vested jurisdiction in the Court of Claims, and/or, the Indian Claims Commission, yet, the petitioners have been denied the "forum" of both the Court of Claims and the said Commission. This certainly is not the "fair and honorable dealings" referred to in 60 Stat. 1050. Moreover, in the *Whitmire* case, supra, this Court quoted from decisions of the Court of Claims (May 8, 1895, 30 and 38 Ct. Cl. pp. 138, 180) as follows:

> "The court decided that under the Cherokee constitution of 1866 the Freedmen became citizens of the Nation equally with the Cherokees, and equally entitled to share in its proceeds, but also decided that the Freedmen to whom the treaty referred were those who had returned to the Nation within six months after the promulgation of the treaty, and their descendants, and that the Freedmen and the descendants of Freedmen who did not return within six months

were excluded from the benefits of the treaty. The court decreed that the Cherokee Nation and the United States be prohibited from making any discrimination between such Freedmen citizens and their descendants and native Cherokees in the distribution of $8,595,736 paid by the United States to the Cherokee Nation for that portion of its territory known as 'Cherokee outlet.'"

This court further stated:

"That the court conceived it necessary to ascertain the individual Indians who were entitled under its decree to share in the fund, and adjudicated that the roll called the 'Wallace Roll' which showed 3,524 persons should be approved by the court."

It is unquestioned by the respondent that petitioners' ancestor, James A. Robinson, was an enrollee, both under the "Wallace Roll" and the Dawes Roll."

3. Petitioners are distributees under the judgment award in Cherokee Nation v. United States, Docket No. 173, 9 Ind. Cl. Comm. 435 (1961).

The Act of May 24, 1949, c. 139, sec. 89(a), 63 Stat. 102 (28 U.S.C., sec. 1505), provides that:

"The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the constitution, laws or treaties of the United States, or executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group."

On September 14, 1961, the Indian Claims Commission rendered a decision against the United States Treasury Department in favor of the Cherokee Nation

in the sum of $14,789,476.16. The petitioners asserted their claims in the Court of Claims for their distributive shares of the said award and the Court of Claims held that it lacked "original jurisdiction to hear and determine such claims."

It is the position of the petitioners, that jurisdiction of the Court of Claims to hear and determine the issues of participation in the above award, is founded upon the provisions of 63 Stat. 102, 28 U.S.C. 1505. The award in question was entered on September 14, 1961, which is a claim arising subsequent to August 13, 1946. If the descendants of the Freedmen were allowed to participate in the Court of Claims in the distribution of the $8,595,736 paid by the United States to the Cherokee Nation in the *Whitmire* case, supra, there is no justification now for denying the petitioners the right to participate in the distribution of the $14,789,476.16 award through their claims in the Court of Claims.

CONCLUSION

We submit that it is the function of the Court of Claims to give to the statutes and treaties a liberal construction and to settle the law, and not to create confusion by failing to abide by the long line of decisions of this Court applicable to Indian affairs, and to follow its own well recognized decisions. This confusion in the law has necessitated petitioners' request that this Court grant certiorari to review the novel and important questions presented in this case.

Respectfully submitted,

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IN THE UNITED STATES COURT OF CLAIMS

* * *

[Filed Jan. 14, 1964]

PETITION.

Comes now the Plaintiffs, by and through their undersigned attorneys, whose contract of employment is hereby attached and made a part hereof, whereas the Plaintiffs hereby state:

I.

The Cherokee Freedmen is a group of individuals established by treaty of July 19, 1866 (14 Stat. 799, II Kap. 942) giving them all the rights of Native Cherokee Indians, and is now an identifiable group pursuant to 9th Article of said Treaty, which is as follows:

> "The Cherokee Nation, having voluntarily, in February, 1863, by an act of the National Council, forever abolished Slavery, hereby covenant and agree that never hereafter shall either slavery or involuntary servitude exist in their nation otherwise than in the punishment of crime. * * * They further agree that all Freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion and are now residents therein, or who may return within six months, and their descendants shall have all the rights of Native Cherokees."

and pursuant to the amended Constitution of the Cherokee Nation which complied with and adopted the provisions of the Treaty of July 19, 1866, and supplemented the above quoted provision by providing that all male citizens over the age of twenty-five years of age were eligible to a seat in the National Council (Sec. 5, Art. 3); that the Freedmen were thereby adopted as part of

the Cherokee Nation and their rights and equities were inextricably interwoven with those of the Cherokee Indians by blood. The Cherokee Freedmen group has, continuously thereafter been recognized by the United States Government and by the statute as an identifiable group, and dealt with respecting property rights and obligations owed them as members and part of the Cherokee Nation of Indians (30 Ct. Clms. 138, Ct. Clms. 180; 44 Clms. 453).

II.

Petitioners herein are descendants, heirs and successors in interest of the Cherokee Freedmen who were by the Treaty of July 19, 1866, aforesaid, liberated pursuant to the voluntary act of their former owners and by law, and/or descendants and heirs of the free colored persons who were occupying and living in the area of the Cherokee Nation, in Indian Territory, now State of Oklahoma, and owned and occupied by the Cherokee Indians, at the commencement of the rebellion, or who returned thereto within six months from the date of said treaty, and who are by said Treaty given equal rights as citizens and an equal interest in the property of the Cherokee Indian Nation, and all other rights of Cherokee Indians by blood.

III.

The Plaintiffs, being members and citizens (14 Stat. 799, 30 Clms. 138) of the Cherokee Indian Nation and Tribe, therefore have the lawful right to bring this suit as individuals under section 10 of the act of August 13, 1946, and as such states:

(a). The individual plaintiffs above-named appear herein and make their claims as individuals and as far as permitted by law, their heirs and successors in interest, who may be found to be entitled to participate in any judgment which may be recovered by the Cherokee Indian Tribes and/or Cherokee Freedmen, and in any property or money to which they are entitled.

(b). Plaintiffs use as successors in interest of the Cherokee Freedmen and as Rejected Cherokee Freedmens and all Cherokee Freedmen similarly situated who are or/and as representatives of all Cherokee Freedmen of the same class.

IV.

This proceeding is brought pursuant to Act of Congress, October 1, 1890, 26 Stat. 636, 1 Kp. 372, approved August 13, 1946, entitled "An Act to Create an Indian Claims Commission, to provide the powers, duties and functions thereof, and for other purposes" (Public Law 726, 79 Congress, Chapter 959, 2nd Session, Section 2 of which provides as follows:

"The Commission shall hear and determine the following claims against the United States on behalf of any Indian Tribe, band, or other identifiable group of American Indians, residing within the territorial limits of the United States or Alaska: (1). Claims in law or equity arising under the Constitution, Law, Treaties of the United States, and executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts and agreements between the claimant and the United States were revised on the ground of fraud, duress, and unconscionable considerations, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by the court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant; and (5) claims based upon fair and honorable dealings what are not recognized by any existing rule of law or equity."

Plaintiffs' claims accrued prior to said act and have not been adjudicated.

V.

The defendant, by Treaties, Acts of Congress and decisions of Court, has recognized the interest and title of the Cherokee Freedmen inclusive with the Cherokee Indians by blood, to lands and property within the Cherokee Nation, and ratified and confirmed their claims to the lands possessed and occupied by them, with all the rights incident to ownership as were given native Cherokee Indians and subject to the same restrictions, providing that any sale, if made, must be to the United States (14 Stat. 799).

VI.

That beginning with the date of the Treaty, aforesaid, July 19, 1866, and within the time prescribed by law, the Cherokee Freedmen remained and established themselves in the Cherokee Indian Nation as adopted members of the Cherokee Tribe, took part in the affairs of the Cherokee Nation, attended and participated in its council meeting. They were farmers, engaged in agriculture pursuits, they raised cattle and other livestock, built homes and made improvements upon lands of the tribe assigned to them, and in every way became an integral part of the Cherokee Indian Nation.

VII.

That in compliance with the directives of the Treaty of July 19, 1866, in 1888 and 1889, Congress authorized a roll to be made of Cherokee Freedmen within the meaning of Section IX of the Treaty of 1866. (25 Stat. 608; 25 Stat. 994). Pursuant thereto the "Wallace Roll" was prepared. October 1, 1890, Congress conferred jurisdiction on the Court of Claims to hear and determine "The just rights in law and equity * * * of the Cherokee Freedmen, who are settled and located in the Cherokee Nation under the provisions and stipulations of Article Nine of the aforesaid Treaty" (26 Stat. 636.) recognition was thereby given to the Cherokee Freedmen as a class with the right of filing a

claim through the Court of Claims against the Cherokee Nation and the United States to recover all monies, lands and rights due them under the Treaty. "*See Moses Whitmire, Trustee for the Freedmen of the Cherokee Nation v. The Cherokee Nation and the United States*, 30 Ct. Clms., 138.)".

VIII.

By Act of Congress, October 1, 1890, (26 Stat. 636, 1 Kap., 372) jurisdiction was conferred upon the Court of Claims to hear and determine the just rights of the Cherokee Freedmen who settled and were located in the Cherokee Nation under the provisions and stipulations of Article 9 of the Treaty of 1866, the Court of Claims took jurisdiction of the claims of said freedmen, and decided (30 Ct. Clms. 138 and 180, Feb. 3, 1896) that the Freedmen to whom the Treaty referred were those who were living in or who had returned to the Nation within six months after the promulgation of the treaty, and their descendants, and that all others were excluded from the benefits of the treaty. The Secretary of the Interior was ordered to appoint a Commission to make a roll of those persons so entitled. The Court further decreed (and it was so directed by Congress, Oct. 1, 1890, 26 Stat. 631) that those Freedmen became citizens of the nation equally with the Cherokees, equally interested and lawfully entitled to equally participate in the common property of the Cherokee Indian Nation, and to share equally in the distribution of all moneys due or to become due, either in law or equity, and to share equally in the funds that had been paid out or might thereafter be paid to the Cherokee Indian Nation, or which in any way had come or might come into possession of the Cherokee Nation, from the sale, leasing, or rent for grazing purposes on Cherokee Lands west of Ninety-six degrees west longitude, and which had been or might be thereafter appropriated and directed to be paid out by the acts passed by the Cherokee council, and for all moneys, lands and rights which should be

due or become due to the said freedmen under the provisions of the aforesaid articles of the treaty and articles of the agreement (26 Stat. L. 636. Ch. 1249).

IX.

That thereafter, in compliance with the Decree of the Court of Claims, February 3, 1896, the Secretary of the Interior appointed Commissioners to make up a roll of the Freedmen entitled to come within the provisions of said Treaty and the rights decreed to them; said Commissioners thereby made and completed the roll known as the Kern-Clifton Roll, comprising approximately 4,361 names of persons lawfully within the provisions of the Treaty of 1866, which roll was approved by the Secretary of the Interior on the 18th day of January, 1897.

X.

Beginning with the month of February, 1897, moneys of the Cherokee Nation, approximately $8,500,000.00 withheld in the Treasury of the United States, by Direction of Congress, in which the Cherokee Freedmen were to participate, were equally paid to the legal residents and citizens of the Cherokee Nation which included the Cherokee Freedmen so enrolled, as legal members of the tribe by adoption, and said Freedmen were thereafter paid money in the same proportion as paid to the Cherokee Indians by blood; thereby they were at all times recognized and treated by the United States as legally adopted members of the Cherokee Indian Nation, that the award rendered by the Indian Claims Commission against the United States Treasury Department, Fiscal Service, Bureau of Account, Budget and Administrative accounts branch on the 14th day of September, 1961, in the amount of $14,789,476.16 which sum of money authorized to be paid by the Indian Claims Commission to the Citizens of the Cherokee Nation, whose names appears on the 1897 Tribal Roll, are to share in this fund, including their descendants; and

that all of these plaintiffs were members of the 1897 Tribal Roll, but are not to share in said funds, however the Defendants are not estopped from denying that those Freedmen were members and Citizens of the Tribe.

XI.

Plaintiffs allege that the United States, during the times herein mentioned, maintained a fiduciary relationship and the same guardianship over the freedmen, and their property rights, as it did over the Indians; their rights and privileges were under the administration, supervision and control of the United States Department of Interior.

XII.

Plaintiffs state that by Act of Congress, March 3, 1893, (27 Stat. L. 612, 645, ch. 209) the Commission to the Five Civilized Tribes was created and on June 10, 1896 (29 Stat. 321) that Commission, known as the Dawes Commission, was directed to enroll the citizens of the respective tribes, preparatory to the allotment in severalty, lands of the tribes in Indian Territory (Now in the State of Oklahoma) to the members of the Tribes, and provided "that the rolls of citizenship of the several tribes as now existing are hereby confirmed", and the Commission should "add thereto the names of citizens whose right may be conferred under the act" and submit such rolls to the Secretary of the Interior for approval. That by Act of June 28, 1898, (30 Stat. 495) known as the Curtis Act, Congress further instructed the Commission, to Wit:

> "Sec. 21, That in making Rolls of Citizenship of the several tribes, as required by law, the Commission to the Five Tribes * * * shall make a roll of Cherokee Freedmen in strict compliance with decree of the Court of Claims rendered the 3rd day of February, 1896, (30 Ct. Claims 138, 180).

XIII.

On the 9th day of April, 1900 (approved by Congress March 1, 1901, 21 Stat. 848, 1 Kap. 715-724) the United States entered into an agreement with the Cherokee Nation of Indians for the allotment of their lands, the manner of enrollment of the citizens of said Cherokee Nation, etc., by which they specifically agreed "such rolls shall be made in strict compliance with the provisions of Section 21 of the Act of Congress of June 28, 1898". By Act of July 1, 1902, (32 Stat. 716, 1 Kap. 787) Congress instructed the allotment of the lands of the Cherokee Nation, extended the time of enrollment therefor as of September 1, 1902, provided for the enrollment of those children born since the 1st day of April, 1900, and be made in strict compliance with the provisions of Sec. 21, of the Act of June 28, 1898 and Act of May 31, 1900".

XIV.

By Act of April 26, 1906 (34 Stat. 137, 3 Kap. 196) Congress provided for final disposition of the affairs of the Five Civilized Tribes, directed that the Commission be terminated, and that all books, records and files be turned over to the Secretary of the Interior; authorized the Secretary of the Interior to complete the rolls, to include only those persons whose names appeared upon any of the tribal rolls whose applications were made prior to December 1, 1905, and gave him until March 4, 1907, within which to carry out those directives, at which time his jurisdiction in that respect ceased.

XV.

Plaintiffs allege that the commission to the Five Civilized Tribes and the Secretary of Interior as agents and representatives of the Defendants, entered upon their duties prescribed by Congress, but in violation of the trust imposed upon them they wholly disregarded their powers, obligations and duties, assumed author-

ity not given to them, and so administered said trust as to result in discrimination, misrepresentation, duress, collusion and fraud as against these plaintiffs and their ancestors; that they wrongfully, fraudently and unlawfully refused to accept and consider the membership rolls of the Freedmen theretofore authorized by Congress, and opinion of the Court of Claims, February 3, 1896 Supra), which were approved and confirmed by the Tribe and the Secretary of the Interior and reconfirmed by Congress; that without notice or warning, they illegally and without authority entirely eliminated these Plaintiffs from the tribal rolls and/or refused to accept their applications for allotments of lands and payments of money to which they were lawfully entitled; that they were arbitrarily and without notice or authority and without regard to the rights of the Freedmen, set up their own plan of distribution or alloting the lands belonging to the Cherokee Nation in which these Plaintiffs and their ancestors were entitled to participate as lawful members of the Tribe. As a result of the aforesaid acts and misdeeds and improper and illegal conduct of the Defendant's Agents and representatives, plaintiffs and their ancestors were deprived of their property, and lawful right to participate in the property of the Cherokee Indian Tribe, for which Defendant should account to Plaintiffs.

XVI.

Plaintiffs allege that as a further result of the unlawful and fraudulent acts of the Defendant by its agent and representatives, as alleged herein, the Plaintiffs were unable to protect themselves from the oppression and frauds that were perpetrated against them, they became confused and bewildered; with the exception of a few, favored by the Commission or representatives of the Defendant, they suffered loss and were deprived of their properties and moneys Congress and the Court intended for them; they were unlawfully and arbitrarily dispossessed or driven from and deprived of their

homes and lands, said lands in which the Defendant deprived said Plaintiffs, are as follows, as far as the Plaintiffs can state, other legal descriptions, are in the hands of the Defendant, and the Defendant refuses to permit all said Plaintiffs to view their records. Said legal description which are in the hands of the Plaintiffs are as follows:

W/2 of SW/4 Section 5, Township 26, Range 16 East, Nowata County, Oklahoma,

NE-1/4 SE 4, Section 5, Township 26, Range 16 East, Nowata County, Oklahoma,

E-1/2 of SE/4 of SW/4, Section 5, Township 26, Range 16 East, Nowata County, Oklahoma,

SE/4 of SW/4 Section 5, Township 26, Range 16 East, Nowata County, Oklahoma,

W/2 of SE/4 of SW/4 Section 5, Township 26, Range 16 E., Nowata County, Oklahoma,

NW/4 of SW/4 Section 5, Township 26, Range 16 East, Nowata County, Oklahoma,

SW/4 of SW/4 Section 5, Township 26, Range 16 East, Nowata County, Oklahoma,

SE/4 Section 5, Township 26, Range 16 East, Nowata County, Oklahoma,

SW/4 of SE/4 Section 5, Township 26, Range 16 East, Nowata County, Oklahoma,

SW/4 of Section 5, Township 26, Range 15 East, Nowata County, Oklahoma,

E/2 of NE/4 Section 6, Township 25, Range 16 East, Nowata County, Oklahoma,

SW-1/4 Section 23, Township 28, Range 20 East, Craig County, Oklahoma,

East 1/2 of the SE 1/4 of Section 34, Township 28, Range 20, East, Craig County, Oklahoma,

SW/4 of NW/4 of NW/4 of Section 27, Township 21, Range 22, of the Indian Territory, Oklahoma,

E/2 of SE/4 of SW/4, and SW/4 of SE/4 of SW/4 of Section 35, Township 25, Range 17 of the Indian Territory, Oklahoma,

NW/4 of SE/4, SW/4 of Section 35, Township 25, Range 17, Indian Territory, Oklahoma,

SW/4 of SE/4 of Section 12, Township 23, Range 16, of the Indian Territory, Oklahoma,

SW/4 of NE/4 of SE/4 of Section 28, Township 22, Range 21, of the Indian Territory, Oklahoma,

N 1/2 of NW/4 of Section 14, Township 24, Range 17, in the Indian Territory, Oklahoma,

SW/4 of NW/4, and NW/4 of SE/4 of NW/4 of Section 14, Township 24, Range 17, in the Indian Territory, Oklahoma,

NE/4 of NE/4 of SE/4 of Section 28, Township 22, Range 21, of the Indian Territory, Oklahoma,

SE/4 of NE/4 of SE/4 of Section 28, Township 22, Range 21, of the Indian Territory, Oklahoma,

and other lands, unknown to the heirs of said lands herein, which are in the possession of said records, of the Defendant, and by the unlawful taking of said lands from the Plaintiffs herein, thus leaving them without any place of habitation or funds with which to sustain themselves and they and their families were impoverished, all of which was contrary to their just, equitable, constitutional, and lawful rights; contrary to the promises made to them by Treaty of July 19, 1866, and the directives of Congress, and contrary to fair and honorable dealings required of the Defendant.

XVII.

Plaintiffs further allege that because of the misrepresentations, discriminations, duress, collusions, fraud and unlawful acts, practiced by Defendant in its fiduciary capacity, as aforesaid, and its disregard to fair and honorable dealings with the Plaintiffs and their ancestors, Plaintiffs are entitled to have their constitutional, lawful and equitable rights restored to them; that as a result thereof, Plaintiffs have been damaged and Defendant is indebted to them for the fair value of Lands and amounts of money for which they were unlawfully and arbitrarily deprived, as aforesaid, the amounts of which are unknown to Plaintiffs, but the defendant has the records thereof and can account for the same under the orders of this court.

WHEREFORE, these Plaintiffs, collectively and individually, as the case may be, demand judgment against the Defendant, as follows:

FIRST: That Defendant be required to account for all moneys appropriated by Congress in which the Plaintiffs were entitled.

SECOND: That Defendant be required to restore, to the Plaintiffs, all the lands including agricultural, oil and all other mineral rights. That Defendant pay to the Plaintiffs damages that have been incurred for the time that the Plaintiffs have been deprived of their lands and the production of said lands.

THIRD: That Plaintiffs be paid 4% interest as reasonable compensation for being deprived of the use of said properties and moneys, as aforesaid.

FOURTH: That allowance be made to Plaintiffs attorneys for reasonable expenses incurred herein, with attorney fees of ten per cent of the amount recovered.

FIFTH: For such other and further relief as in the premises they may be entitled.

Respectfully Submitted,

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Attorneys for Plaintiffs.

[April 5, 1965]

ORDER

This case comes before the Court on defendant's motion for summary judgment. Upon consideration thereof, together with the briefs of the parties, and without oral argument, it is concluded that: (1) to the extent that plaintiffs' claim is based on the Indian Claims Commission Act, the claim accrued long prior to August 13, 1946, and this court has no jurisdiction of the claim under that Act; (2) to the extent that plaintiffs' petition asserts a claim under the Act of October 1, 1890 (26 Stat. 636), the claim is barred by the statute of limitations; (3) to the extent that the petition asserts claims based upon plaintiffs' alleged rights to share in the judgment rendered by the Indian Claims Commission in *Cherokee Nation v. United States*, Docket No. 173, 9 Ind. Cl. Comm. 435 (1961), the court

lacks original jurisdiction to hear and to determine such claims, and (4) to the extent that the petition asserts a claim by individuals that might be cognizable under 28 U.S.C. 1491, the claim is barred by the 6-year statute of limitations, and

IT IS ORDERED that defendant's motion for summary judgment be and the same is granted and plaintiffs' petition is dismissed.

BY THE COURT

Wilson Cowen
Chief Judge

ORDER

These cases come before the court on motions for rehearing, reconsideration, to vacate judgment entered for failure to prosecute, and request for the court to review the findings of the court under Rules 68 and 69 of the rules of this court and on consideration thereof,

IT IS ORDERED this 11th day of June 1965, that said motions be and the same are denied as follows:

* * *

11-64 James A. Robinson, Deceased, by Bessie L. Tallaferro Robinson, et al. Plaintiff's motion.

* * *

BY THE COURT

Wilson Cowen
Chief Judge

* * *

STATUTES AND TREATIES INVOLVED

Treaty of July 19, 1866, 14 Stat. 799:

> "The Cherokee Nation, having voluntarily, in February, 1863, by an act of the National Council, forever abolished Slavery, hereby covenant and agree that never hereafter shall either slavery or involuntary servitude exist in their nation otherwise than in the punishment of crime. * * * They further agree that all Freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion and are now residents therein, or who may return within six months, and their descendants shall have all the rights of Native Cherokees."

Act of October 1, 1890, 26 Stat. 636:

> "The Commission shall hear and determine the following claims against the United States on behalf of any Indian Tribe, band, or other identifiable group of American Indians, residing within the territorial limits of the United States or Alaska; (I). Claims in law or equity arising under the Constitution, Law, Treaties of the United States, and executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts and agreements between the claimant and the United States were revised on the ground of fraud, duress, and unconscionable considerations, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by the court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant; and (5) claims based upon fair and honorable dealings what are not recognized by any existing rule of law or equity."